# Justice and (Global) Constitutionalism

# Justice and (Global) Constitutionalism: The International Criminal Court in the Global Order[1]

Can the International Criminal Court, as currently constituted in the international legal and political order, create a more just world order? We believe it can, but we argue here that more can be done to achieve this end. To make this argument, we propose a normative standard against which the Court's activities and presence can be evaluated to explore whether or not it is providing both particular and global justice. We look to the institutional structure of the court, one of its cases, and its external relationship to the Security Council to make this argument concrete.

Justice is an elusive concept. It is similar to fairness, or the distribution of goods on the basis of some agreed upon metric. This metric might result from a historical process in which the past behaviour of individuals determines the goods they can receive. The metric might result from the standing of all members in a social and political context such as citizenship in a domestic society or humanity in a global society. Alternatively, the metric might be the result of the determination of needs, either seeking to correct past failures to distribute goods fairly or past failures in terms of patterns of exclusion or harm.

The issues at the core of this chapter – the protection of individuals from violence and the promotion of their human rights – concerns a different type of justice. International criminal justice, as with domestic criminal justice, 'embodies notions of fairness to all members of the community, including victims and offenders, and striking a balance between their competing interests'.[2] Concretely, it means two things: first, victims of crimes are given the opportunity to achieve retributive justice through a court system by seeing that those who have harmed them are prosecuted and punished; second, individuals who are charged with crimes are given the full protection of a legal system in which their rights to a fair trial are ensured. This conceptualization of justice as a form of protection of both victims

and perpetrators parallels the ideas of distributive justice in economic and social matters but it is not precisely the same.

Both distributive justice and criminal justice require law and politics nested within a functioning order. In other words, to achieve both kinds of justice, some form of a constitutional order is required. Justice cannot be given to one or two individuals, for it would no longer be justice; justice by definition requires fair distribution across an entire group. The content of that group requires some definition, which might be local, national, international or global. But, in whatever community it applies, justice would seem to require some application across an entire group.

The chapter proceeds as follows. The next section provides an overview of constitutional theory as it relates to questions of justice. This is followed by an explanation of the constitutional structure of the Court and its first ever case, particularly in relation to upholding the rule of law and protecting human rights (of both the accused and victims). The following section briefly explores the Court's position in the global order by focusing on the relationship between the Court and the Security Council in terms of a global separation of powers. The final section uses the framing of constitutionalism and justice to evaluate the Court's ability to achieve justice.

## Constitutionalism and Justice

Constitutionalism is a political theory with two principle elements: 1) political power is used by people through law and institutions; 2) institutions and political leaders are limited by the law. Constitutionalism both enables the creation of institutions and laws and limits those who lead those institutions and execute those laws. Constitutionalism in the modern world implies the existence of a written constitution, though not all constitutional states have such a text (the United Kingdom being the most prominent example). Constitutionalism

achieves its enabling and limiting functions through four devices: the rule of law, separation of powers, constituent powers, and provision of rights.

Global constitutionalism is the idea there is a constitutional order at the global level. For some, this constitutionalism finds expression in the increasing constitutionalization of international law.[3] This mode of constitutionalism gives primacy to states, though it suggests that there is a slow process by which states as the primary agents in the international order may be losing influence in relation to institutions and peoples as active drivers of political life. For instance, in an institution such as the World Trade Organization (WTO) and United Nations Human Rights Council (UNHRC), states constitute the primary agents but the role played by other agents (companies, NGOs, experts) moves power and law-making outside the province of states alone. These developments do not imply that there will suddenly by a fully-fledged global constitutional convention and a resulting written global constitution; rather, they suggest that various developments at different levels indicate important changes in the global political and legal order.

Constitutions do not determine outcomes; they establish procedures by which political systems generate outcomes. Specifically, constitutions establish how laws are made (legislature), how they are executed (executive), and how disagreements concerning politics and law are decided (judicial). It is the laws, regulations, and court decisions that determine the outcomes in a political system. One might conclude from this that a constitution has little to do with justice and more to do with procedures that might or might not achieve justice. This is why constitutions and constitutionalism are sometimes seen as conservative institutions, for they do not necessarily create just outcomes. They might create such outcomes, but they do not determine them in advance. Instead, they create the conditions in which individuals can pursue the policies they find most amenable.

Constitutions can advance justice in two ways. First, constitutions authorize political systems in which persons are equal. Equality tends to appear in two primary ways in a constitution: first, all persons are equally represented through an electoral system; and two, all people are treated equally before the law, whether they are convicted of a crime or victims of a crime. These fundamental elements of constitutional life give equality a central role.[4]

Second, most modern constitutional systems, including the global one, include a provision of rights. Rights establish a kind of just outcome, one in which individuals can claim against others something that they deserve. Especially as the kinds of rights that can be claimed have expanded beyond those concerning 'civil and political' to 'economic and social', they have moved closer to some conception of justice. That is, as noted above, justice is usually about a fair distribution of resources. So, when economic and social affairs are addressed through the frame of rights, such discourses become progressively more justice oriented, both at the domestic and global levels.

Together, these two points suggest that constitutions can contribute to creating a just political order, though they might not be able to precisely lay out a system in which specific standards can be achieved. There needs to be some potential for alterations and developments in constitutional life.

Two examples demonstrate these points. The first comes from John Rawls, whose *A Theory of Justice*[5] helped to resurrect debates and ideas about justice in the 20th century. The book makes two main points relevant for our analysis. First, Rawls proposed that in order to determine the institutional arrangements that would be most just, we should envision ourselves in an 'original position' that is posited behind a 'veil of ignorance' in which we do not know what kind of attributes, benefits or deficiencies we may have as individuals. This means that even if acting self-interestedly, we will choose to arrange society in such a way that it will be to the benefit of the worst off since we might well find ourselves in that

position. Second, as a result of this starting point, Rawls proposes that we will choose to organize the political realm in such a way that it will guarantee that 1) each person has an equal right to the most extensive liberty compatible with a like liberty for all 2) social and economic inequalities can only be justified if they are to the benefit of the least advantaged, and 3) all offices and positions should be open to all members of society in accordance with the idea of equal opportunity. Rawls' conception of justice incorporates both liberty and equality and seeks to establish how political structures can create outcomes that distribute wealth equally and fairly. There are numerous alternatives to Rawls' account, but the point in highlighting his work here is to demonstrate how a theory of justice can relate to a constitutional structure. Rawls theory proposes how equality makes its way into constitutional life. By ensuring that all persons have equal access to opportunities, his liberal theory demonstrates how a constitutional structure can achieve justice.

The second way constitutions achieve justice is through the provision of rights. Rather than a theorist of justice and/or constitutionalism, a good place to see how rights and constitutions connect is in debates about the American constitution at its founding. These debates centred on whether or not an enumeration of rights was necessary for the American constitution to function effectively. James Madison, one of the key drafters of the American constitutional text, did not at first believe that a list of rights was necessary. According to Madison, simply constructing a proper political system should create a procedural structure by which rights would be protected.[6] During the debates about ratification that followed the crafting the constitution, however, it soon became evident to Madison and others that without an enumeration of rights, there was very little chance of the constitution being approved by the 13 constituent states that had created it. In this debate, and then in the course of European constitutional debates, rights became strongly associated with constitutions, resulting in the assumption that they are necessary part of any constitutional text and constitutional system.

These enumerated rights have progressively become part of the ideology which we think of as constitutionalism.[7]

Constitutions advance justice through the establishment of equal treatment and the provision of rights. Do these criteria exist at the global level? There is clearly a strong and growing consensus around the importance of rights at the global level. Both international law and international institutions have become loci for the protection and advancement of rights in different ways.[8] Some have pointed to how the global scope of rights has impacted domestic political and legal systems, creating a 'global model of constitutional rights'.[9] The criterion of equal treatment through institutional arrangements has been less well developed, however. Of course, equality is an important principle across any liberal order, including the international one. But, perhaps because of the different kinds of agents in the international order (i.e., states, NGOs, etc.) there has been less attention to equality among individual persons. Efforts to create a global parliament are perhaps one of the most prominent efforts to create global equality, but this is a long term ideal rather than a currently workable reality. Instead, there are some institutions that have sought to create more equality among individuals through the global political and legal order by building on current practices. One prominent example of this tendency is the institution of the International Criminal Court (ICC).

## The International Criminal Court

The ICC can be evaluated in two ways according to the idea of constitutionalism. First, we can assess whether it can advance justice in particular cases in terms of the internal mechanisms by which it functions. This means evaluating the Court as a constitutional entity in terms of advancing the rule of law and protecting rights. Moreover, the interactions of the

Prosecutor with the Trial Chambers reflects a kind of separation of powers, one that works toward fairness and justice by ensuring no one entity has control over the process.

The second way the Court can be evaluated is how it sits within the wider international order. This moves the argument from a constitutional to a global constitutional dimension. Here, we can explore the Court in two ways: first, in what ways does it react to global 'executive' bodies, specifically the United Nations Security Council. Second, in its judgments and actions, does the Court play any role in 'legislating' for the global political and legal order. Because the internal functions deal with individual persons regardless of their nationality or citizenship, we refer to this as global constitutionalism. The interactions of the ICC with the Security Council reflects an international legal order in which states are the primary agents. As such, we refer to this set of interactions as international constitutionalism.[10]

In order to explore these dimensions of the Court, the next section explores the Court's functioning in a particular case, that of Thomas Lubanga Dyilo. In this case, the advancement of justice required the Court's different parts to interact and balance each other, resulting in a prosecution that protected the rights of the accused but also brought justice to the victims. We then look at the Court's relationship with the UN Security Council, suggesting that the current relationship is problematic in some ways by double standards that exist between non-states parties being able to utilise (and to some extent also dominate) the Court.

## Global Constitutionalism and the ICC's internal functions

As is well known, the ICC came into being on 1 July 2002; it has 124 states parties (i.e. members) and commits itself to serve 'the highest standards of fairness and due process'.[11]

The ICC has three different organs: the judicial division, the Assembly of State Parties and the Office of the Prosecutor (OTP). The OTP is charged with investigating and prosecuting, it receives referrals and substantiated information on possible crimes within the ICC's jurisdiction. It decides on questions of jurisdiction and admissibility and ultimately whether or not to open an investigation into a particular situation. According to the Rome Statute, the Prosecutor has powers to act independently and impartially to *protect the rule of law*. The Statute has clear criteria for establishing admissibility (such as the principle of complementarity) but even though decisions on judicial intervention, i.e. on whether or not to open investigations into particular situations, are always political, this political process is law-governed. It is constrained by legal principles (such as requirements of gravity) that are clearly stipulated in the Rome Statute. Such guidelines and rules exist within the Statute to ensure a fair and representative process as much as possible. This focus on representativeness and fairness can also be seen in the ICC's institutional set-up, such as the composition of the Judicial Divisions that consist of 18 judges that have been selected according to competence, experience and integrity.

As argued earlier, the *separation of powers* is a crucial aspect of global constitutionalism. By both limiting the power of one particular actor within the system while at the same time enabling power, power is channelled towards productive and useful ends. Such a separation of powers can be seen within the ICC for instance by the Prosecutor working with states parties and the UN in order to gather relevant information and evidence about possible ICC crimes. Before formally opening an investigation, the OTP needs to apply to a Pre-trial Chamber to establish admissibility. This separation of powers ensures that information is evaluated by different actors; the Prosecutor cannot act completely independently but is part of a law-governed structure that ensures procedural fairness. Based

on evidence provided by the Prosecutor, the Pre-trial chamber has the powers to issue summonses or arrest warrants and also to confirm charges against individual persons.

The *protection of rights* is of course another crucial element within the Rome Statute and it speaks to this paper's conception of justice as a form of protection for victims as well as perpetrators. In line with Article 53, the Prosecutor can desist from opening an investigation if it is not 'in the interest of justice'. However, the Rome Statute gives little guidance on what criteria the OTP should apply to determine what those 'interests' might constitute beyond the obligation to consider the gravity of the crime, the interests of victims and the role of the alleged perpetrator. Once proceedings have started, the trial chambers are tasked with protecting the rights of the defence, victims and witnesses in equal measure. The chambers also have the responsibility to ensure fair and impartial proceedings and follow due process.

Some of these different roles and responsibilities that are institutionalised in the Rome Statute conflict at times and the challenge lies in finding ways/procedures to ensure the ICC retains its legitimacy.

***The Lubanga trial and conflicting responsibilities***

In consideration of these criteria, the ICC's first ever completed trial, that of Thomas Lubanga Dyilo of the Democratic Republic of Congo (DRC), is an interesting case as a number of its elements, such as the respect for the rule of law, the strict separation of powers and the protection of rights of the people directly affected by the trial (i.e. the accused as well as the victims) are all discernible in the disputes prior to the start of the proceedings. Different institutions within the ICC, namely the judicial chambers and the OTP, had differing views on their roles and responsibilities within the trial process.

The main disagreement lay in two, seemingly conflicting provisions within the Statute that both relate to the OTP's responsibilities: Art. 54(3)(e) that sets out that the Prosecutor may not disclose information obtained on the condition of confidentiality and solely on the purpose of generating new evidence; and Article 67(2) that states that the Prosecutor is obliged to disclose evidence which might show the innocence of the accused or mitigate their guilt. The latter Article also provides that 'in case of doubt as the application of this paragraph, the Court shall decide,' which is exactly what happened in the proceedings ahead of the Lubanga trial.

***Brief background to the case***

On 23 June 2004, the OTP opened is first investigation of the ICC by looking into grave crimes allegedly committed on the territory of the DRC since 1 July 2002 (the date the Rome Statute entered into force). The DRC became states party of the ICC on 11 April 2002 and referred the situation to the OTP in April 2004. On 17 March 2006 Thomas Lubanga Dyilo, founder and leader of the Union des Patriotes Congolais (UPC) and the commander-in-chief of its military wing, the Forces Patriotiques pour la Libération du Congo (FPLC) was arrested and surrendered to the Court. He was accused of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities in the DRC's Ituri region from September 2002 to 13 August 2003. The crimes Lubanga was charged with are listed as war crimes under Articles 8 of the Rome Statute. The proceedings were halted twice before the actual trial started in January 2009. There was a clear tension between the OTP's need to build a case and incentivise cooperation by ensuring confidentiality to its information providers on the one hand and the right of the accused to receive a fair trial by having access to any potentially exculpatory evidence on the other.

Lubanga's was a relatively small case but a first for the ICC in many respects which made it so important for the ICC in order to demonstrate how it discharged its judicial functions and overcome tensions within its own Statute without compromising justice. As others have rightly argued: "the creation and efficient functioning of a new institution must begin somewhere. A fair trial of Thomas Lubanga is an essential step in attaining an effective and legitimate ICC. (…) If victims of war crimes do not feel as if the Tribunal is working in the interest of justice, the Tribunal cannot attain legitimacy."[12]

***First stay of proceedings***

On 13 June 2008, Trial Chamber I imposed a stay on the proceedings against Lubanga, arguing that the Prosecutor had misused the Rome Statute's Article 54(3)(e) that allows the Prosecutor in exceptional circumstances to receive information or documents on the condition of confidentiality. This Article also stipulates that this can only be done if the information is then not used for trial but purely for generating new evidence. Trial Chamber I argued that "in highly restricted circumstances, the prosecution is given the opportunity to agree not to disclose material provided to it at any stage in the proceedings. … the only purpose of receiving this material should be that it is to lead to other evidence".[13]

The Trial Chamber was concerned that in this case the Prosecutor had misused this provision by not disclosing over 200 documents "which the prosecution accepts have potential exculpatory effect or which are material to defence preparation".[14] The Chamber argued that this inhibited the accused from preparing his defence and violated a 'fundamental aspect of the accused's right to a fair trial'.[15] Within the Rome Statute, the Trial Chamber has powers to 'stay' proceedings if it deems that the rights of the accused have been violated.

The Trial Chamber was critical of the Prosecutor using confidentiality agreements routinely (rather than in exceptional circumstances) and also inappropriately. The Trial Chamber held that the Prosecutor used the Statute's provisions to

> obtain a wide range of materials under the cloak of confidentiality. … The prosecution's approach constitutes a wholesale and serious abuse, and a violation of an important provision which was intended for the prosecution to receive evidence confidentially, and in very restricted circumstances.[16]

The language used by the Trial Chamber in making this assessment shows clearly that it had lost its faith in the OTP's approach to ensure a fair trial (e.g. calling its approach "a wholesale and serious abuse"). This is problematic for the trial process, because 'the premise of an approach that allows the Prosecution to resolve conflicts between confidential lead evidence and disclosure is that the Prosecution can be trusted when it performs this function to protect the rights of the Accused'.[17]

The Trial Chamber asked the Prosecutor to disclose all potentially exculpatory information to the accused. In this case the information was provided by the UN and NGOs with agreement that the documents would not be disclosed. The information providers where keen to sign up to such agreements because they were concerned about protecting their operations on the ground, shield their personnel from possible retaliation and also protect the security of their sources.[18] Understandably, requirements of a fair trial were not of central importance to them.[19] The Trial Chamber aimed to uphold this important provision within the ICC Statute, however, to ensure the trial process is a just one, not only for victims but also for the accused. It concluded that disclosing the relevant information was necessary for a right to fair trial, which it called "without doubt a fundamental right".[20] . The Chamber stressed that it was not up to the Prosecutor to decide which materials should be made available to the accused, stressing the clear separation of powers to safeguard interests of justice and fairness.

The Trial Chamber had to strike a balance between ensuring the right to a fair trial for the accused with giving victims the possibility to achieve justice by holding those responsible for serious crimes accountable for their actions. Both, victims and accused, are constituents of the Court and the question is whether and which one needs to be prioritised? Arguably both have an interest in fair and just proceedings to ensure that the outcome of the trial is not tarnished by accusations of illegitimacy or irregularity.

***OTP Response and Appeals Chamber Decision***

On 23 June, the OTP appealed the Trial Chamber's decision, refuting the claim that it had used confidentiality agreements inappropriately.[21] The Prosecutor argued that information providers insisted on making information subject to confidentiality and that it was therefore not a matter of choice but one of legal obligation that it would not disclose information. He claimed that he would not have received the information in the first place had he not agreed to confidentiality. This highlights a clear inherent tension in the trial proceeding between the Prosecutor's roles of building a case against an individual while at the same time having to satisfy requirements for a fair trial for the accused.

On 21 October 2008, the Appeals Chamber dismissed the OTP's appeal to halt the proceedings.[22] It confirmed the ICC Statute's provision that the Prosecutor could only rely on confidentiality for the purpose of generating new evidence and must not lead to breaches of obligations towards the accused. The Appeals Chamber held that decisions on whether any particular (potentially exculpatory) evidence needed to be disclosed had to be made by the Judicial Divisions, not the OTP. It argued that it was up to the judicial divisions (and not the OTP) to assess whether certain information needed to be disclosed in order to uphold the Court's institutionalised separation of power. It also raised concerns that if the accused was unable to prepare for the trial, any verdict would potentially be unsafe because there would

always be the question whether the undisclosed material would have made a difference to the outcome.[23] This would then frustrate justice for both, the victims as well as the accused.

This issue was eventually resolved on 18 November 2008 when the stay of proceedings was lifted and the trial date scheduled for 26 January 2009. The information providers had agreed to give complete access to all relevant undisclosed documents to both Judicial Divisions and the trial could begin.

***Second stay of proceedings***

On 8 July 2010, however, Trial Chamber I ordered another stay of proceedings in the case, arguing that a fair trial of the accused was not possible because the OTP refused to implement an order it had been given. The Trial Chamber argued that "in order for the Chamber to ensure that the accused receives a fair trial, it is necessary that its orders, decisions and rulings are respected, unless and until they are overturned on appeal, or suspended by order of the Court".[24]

The Court had ordered very limited disclosure of one intermediary's identity, adding that protective measures had been offered and agreed with the intermediary in question as well as the Victims and Witnesses Unit (VWU). The OTP claimed, however, that it was responsible for the protection of the witness and that it could therefore not disclose his/her identity within the set time limits. The Prosecution referred to its own legal and statutory duties that conflicted with having to disclose information that might compromise that individual's protection. There was a clear tension between the OTP that claimed that a witness might be in danger and the Trial Chamber that argued that the Prosecution had to follow its orders.

The Chamber was frustrated with the Prosecutor's refusal to follow its orders and considered this to be a breach of the separation of powers, institutionalised in the ICC Statute

that ensures a fair and just process to all involved. It was concerned that the Prosecutor claimed to have autonomy with regard to whether or not to comply with Court orders depending on his interpretations of his responsibilities in accordance with the ICC Statute. The Chamber argued that the Statute provided that the judicial division was *ultimately* responsible for protective measures once proceedings had started, not the Prosecutor.

The judicial division's arguments show a clear focus on global constitutionalism's rule of law, protection of rights and separation of powers in this instance. The Trial Chamber held that "No criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations".[25] Its main criticism was based on the Prosecutor claiming "a separate authority which can defeat the orders of the Court, and which thereby involves a profound, unacceptable and unjustified intrusion into the role of the judiciary".[26]

The Appeals Chamber held that the Prosecutor did not comply with binding Court orders and reaffirmed the Trial Chamber's role as "the ultimate guardian of a fair and expeditious trial".[27] It argued that if there was a conflict between the Prosecutor's perception of his duties and a Trial Chamber's order, the latter's views needed to prevail, calling this process "a fundamental criterion for any trial to be fair."[28] The Appeals Chamber decided, however, that the Trial Chamber should not have ordered a stay of proceedings without first imposing sanctions to bring about the Prosecutor's compliance with its orders and that the trial could resume.

On 14 March 2012, after 2 years of trial proceedings and six years after his arrest, Lubanga was eventually convicted of committing, as co-perpetrator, war crimes related to the

use of child soldiers. His sentence of 14 years imprisonment was confirmed by the Appeals Chamber on 1 December 2014.

In terms of constitutional theory, it can be argued that the Court in this particular case has advanced justice. By ensuring that the accused was treated fairly and that the Prosecutor's Office could not ride rough shod over the rights of the accused, the Court ensured the protection of the accused's rights. The judicial division protected the ICC's separation of power that avoids one organ becoming too powerful. At the same time, the Court did find Lubanga guilty through a measured process that protected the rights of all involved. This provided justice to the accused but also – and perhaps more importantly - the individuals who were subject to the violence.

In the next section, we move away from the particulars of a specific case and toward the wider global context in which the Court is located by exploring the relationship of the Court to the UN Security Council.

## Separating from (and Working with) the United Nations Security Council

The Court is a treaty based organization and thus has legitimacy and authority on the basis of positive international law. Its origins in a treaty give it more legitimacy, perhaps, than the international criminal tribunals that were created by the UN Security Council through resolutions and thereby imposed on states. Its standing in the international legal order, in other words, is formally very strong. This formal strength is weakened on a practical level by the refusal of key great powers to join, including three of the P5 (Russia, China and the United States). This political weakness has evolved to some extent, however, if one looks at the gradual acceptance of the Court by the United States. For instance, the government of George W. Bush, despite its initial hostility to the Court, abstained from voting on issuing an indictment against the President of Sudan in 2005 (i.e. it did not veto the decision). In 2009,

with Obama coming into office, the US engaged even more with the ICC and took an active role in drafting the UNSC Resolution that issued indictments for the Libyan leader, Muammar Gaddafi, and two others during the campaign against Libya in 2011.[29] These two referrals provide tacit acknowledgment of the role that the Court can play in international efforts to protect human rights and advance international criminal law.

So, in accordance with traditional international law and politics, the Court has a somewhat paradoxical status. It is, on the one hand, clearly established in the legal order but, on the other hand, subject to a lack of political legitimacy because of the failure of the powerful agents in the system to fully accept its role. (As noted, this might be changing as the great powers begin to accept its role.) Rather than focussing on these formal legal and political categories, however, a different way to see the status of the Court is through an international constitutional model. The Court sits on its own in terms of its treaty-based legitimacy, but it has connections to other institutions in the international order, specifically the United Nations.

During the Rome conference, the P5 (and especially the US) wanted to give more power to the Security Council by being able to halt proceedings before the ICC. This was not accepted by the majority of states, however, and a compromise was negotiated. Article 16 allows the Security Council to adopt a resolution to defer any investigation for a period of 12 months (renewable) in accordance with Chapter VII of the UN Charter. This so-called 'Singapore Compromise' was an attempt to give the Council the ability to prevent prosecutions taking place in situations of ongoing conflict, yet not allow such deferrals to be permanent.

During the Rome conference, the US also wanted to restrict the Court to Security Council referrals alone. This was not supported by the majority of states that argued in

favour of state party referrals as well as the *proprio motu* powers of the Prosecutor. This result allows the ICC to act regardless of the Security Council which prevents the latter from becoming too powerful– at least with regard to absolutely dominating the Court as independent judicial mechanism. The negotiations in Rome also meant a move away from a complete state-centeredness when it comes to international criminal justice, taking the victims (as yet another constituent of the Court) into account. By giving the Prosecutor independent powers, there is no need to wait for state interests to come into play before the ICC can investigate a particular situation.

One can argue that the two ad hoc tribunals on the other hand, were attempts by the Council to take over a judicial function in addition to being the executive and legislative on certain aspects. The ICC can therefore be seen to constitute a clear 'improvement' on the previous work of the Security Council, seeking to dominate the international legal and political order. Had the US succeeded in its proposals that the Court could only act if the Council instructed it to do so, the Council would then have institutionalised its judicial function in the international order.

Security Council referrals do not require state consent and – because they are based on a Council resolution – are binding on *all* UN member states. This still gives the Council a more powerful and central role when it comes to Court action and also highlights the double standards the Council is working with.[30] But this might not be as problematic for a global constitutional ideal as it currently stands, because, as Bosco argued: "Double standards are deeply rooted in existing global governance structures, and the new court appears more likely to reflect those than to alter them…. The court's first decade suggests that it may be possible to design international institutions around power – but not to escape it".[31]

Indeed, we would argue that combining law and politics is precisely what a constitutional order can do, so reflecting power in a constitutional relationship is not

necessarily a negative outcome. Certainly, the relationship between law and politics is complicated. While a decision to prosecute a crime is certainly political in part, no matter where its origin, the benefit of limiting the role of the Security Council is that it gives more legal legitimacy to the process. Security Council referrals are political decisions, but there is a clear separation to the Court as a judicial institution because the Court uses clear legal criteria in its process, i.e. moving away from politics towards the rule of law. As Fatou Bensouda, the current Prosecutor, notes: "In part, of course, such referrals do reflect political choices. However, once a situation has been referred to the Court, a judicial process ensues and only legal criteria and legal standards apply."[32]

On one level, this is simply a matter of negotiating an international legal treaty in light of the influence of a powerful actor. If looked at through the lens of international constitutionalism, however, it raises some important questions about a global separation of powers. The separation of powers idea, called 'checks and balances' in US constitutional law, is based on some different premises. For the American founders, it was a principle designed to limit the power of any one agent in the political order. This is not just about limiting the executive, for it was the problem of a British parliament having too much power that also animated the founders.[33] There is also a functional logic in the separation of powers which assumes that when each agent pursues its particular role, the system is more efficient.[34] An older argument, one sometimes called the mixed constitution, reflects the idea that different agents in a political order will reflect different interests.[35] In all these different accounts, though, there is a balance to be found between coordination and conflict. It is important that some conflict must exist between the different branches, for if they acted in unison there would be no need for any type of separation. Some level of coordination is also necessary for without it the separation of powers idea would result in the breakdown of governing.

The American demand for a stronger role for the UN Security Council could be justified in accordance with the pragmatic idea of allowing different branches of government to work together; it is indeed true that if the Security Council is unable to pursue peace operations because of the Court pursuing a prosecution, the system will break down.[36] Undoubtedly, the American demand is not just derived from a hope that the UN Security Council will function effectively, as the protection of US power is also relevant here. Moreover, American international lawyers such as Ruth Wedgwood and Jack Goldsmith who objected to the Court[37] often argue that the US constitution would be compromised by participation in the Court. This argument is ironic in that it is a fundamental principle of US constitutionalism that checks and balances is one of the best protections against the aggrandizement of power.[38]

The fact that there exists a formalized relationship between the Court and the Council indicates that there is a constitutional structure in place. The fact that the relationship is a conflictual one might also be a reflection of a constitutional structure, for constitutionalism is not just about law but also about political power. The fact that the relationship does not seem to have produced productive outcomes, however, means that perhaps this arrangement is not as fully constitutional as it should be; that is, there is a formalized structure in place, but it is not a structure that is creating a just outcome at least if measured by the ability of the Court to prosecute cases and still allow the Council to pursue peaceful outcomes to ongoing conflicts. Constitutional systems evolve, so the current state of affairs between the Court and Council need not be the same forever. As the United States has moderated its attitude toward the Court, the relationship between the Court and the Council may well see improvements in the future.[39] At this stage, the current structure reflects a weak constitutional relationship, one that we hope will evolve into a more robust, effective, and just structure.

## Conclusions

Our argument has sought to demonstrate that the ICC can advance justice in the international order. To make this normative judgment we set out a standard drawn from the political theory of constitutionalism as a way to assess its ability to achieve justice. In explaining this normative ideal, we began by noting that the constitutionalism can be applied to the internal functions of the Court, which we see as an instantiation of global constitutionalism. To assess the internal functions, we drew on one specific case, that of Thomas Lubanga. What these arguments have shown is that the different organs within the ICC had to 'battle' to find the best way for the Court to work in the interest of justice – i.e. the protection of rights for the victims as well as the accused. A number of authors have observed that in this case the OTP over-relied on confidentiality agreements to build its case against Lubanga.[40] Even though the OTP's argument that it would not have been able to receive information had it not been for these agreements, might be true, it is generally agreed that the Prosecutor took this too far and was eventually reigned back in by the ICC's judicial division. It became clear that the problem was not so much the Statute's possibly conflicting Articles but the approach of the Prosecutor to abuse his powers:

> the habit of presenting evidence for disclosure and redaction in large amounts and at a late stage in the proceedings, does not stem from a misunderstanding of the Statute and the Rules, but seems to point at prosecutorial mismanagement and disregard for fundamental rights of the accused, while at the same time excluding the Chamber from verifying the materials.[41]

Arguably, different Articles in the Statute do contain conflicting rules and the ICC's institutions had to find ways of interpreting them. The ICC's first case was inevitably divisive with differing interests of its various constituencies. A clear separation of powers between the different units within the Court is given and – in this case - the judicial divisions acted as 'guardians' of the rule of law by protecting the accused's right to a fair trial. This is in line

with this chapter's conception of justice as a form of protection – in this case from the OTP's over-reliance on confidentiality that threatened to undermine the fair trial process.

The second part of our chapter sought to briefly lay out the status of the Court in the wider international legal and political order, which we see as an instantiation of international constitutionalism. In this section, we briefly looked at the relationship of the Court to the UN Security Council. In this situation, the Court has played an important role in creating a more just order by establishing a judicial power that is separate from and counter to the Security Council. At the same time, it also is one that can work with the Council in order to achieve peace and justice for victims. While this relationship is constitutional in part, it is perhaps the place where the Court needs to become even more constitutional especially if constitutional is seen as a means to seek justice. If the Court can continue to work with the Council and with its powerful permanent members, the effectiveness of the system will increase. But if the Court allows the Council to advance particular interests of its powerful agents, this will undermine its ability to seek justice.

This chapter is part of a larger effort to explore constitutionalism in and around the ICC. We explore other elements of the Court, such as support for victims and the role of the Assembly of State Parties as part of this ongoing research effort. We see this chapter as setting out briefly how the ICC reflects both global and international constitutionalism, and, in so doing, can contribute to a more just world order.

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[1] A version of this chapter appears in Anthony F Lang, Jr and Antje Wiener, eds., *Handbook on Global Constitutionalism* (London: Edward Elgar Publishers, 2017)

[2] Susan Easton and Christine Piper, Sentencing and Punishment: The Quest for Justice (Oxford: Oxford University Press, 2005): 7

[3] Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

[4] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge MA: Harvard University Press, 2000).

[5] John Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, 1971).

[6] Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (Oxfor: Oxford University Press, 2006); Bernard Bailyn, ed. *The Debate on the Constitution* (New York: The Library of America, 1993).

[7] Alexander Somek, *The Cosmopolitan Constitution* (Oxford: Oxford University Press, 2014).

[8] Antonio Cassese, ed. *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012). And Ruti Teitel, *Humanity's Law* (Oxford: Oxford University Press, 2011).
[9] Kai Moller, *The Global Model of Constitutional Rights* (Oxford Oxford University Press, 2012).
[10] In a different iteration of this paper, we develop the international constitutionalism dimension of the ICC through an exploration of the Assembly of State Parties, which is the governing structure of the Court. Here, our focus is on the interactions of the Court with the Council, a different manifestation of international constitutionalism.
[11] See the International Criminal Court website for more details on the institution: www.icc-cpi.int/
[12] Sara Anoushirvani, "The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo," *Pace International Law Review* 22, no. 1 (2010): 235-36; Kai Ambos, "Confidential Investigations (Article 54(3)(E) Icc Statute) Vs. Disclosure Obligations: The Lubanga Case and National Law," *New Criminal Law Review* 12, no. 4 (2009). See also AMBOS, KAI. (2009) Confidential Investigations (Article 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law. *New Criminal Law Review* 12, (4), 543-568.
[13] ICC Trial Chamber I, *Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(E) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008*, 13 June 2008, at 71.
[14] ICC, "Trial Chamber Imposes a Stay on the Proceedings of the Case against Thomas Lubanga Dyilo " news release, 16 June 2008, 2008, http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20%282008%29/Pages/trial%20chamber%20imposes%20a%20stay%20on%20the%20proceedings%20of%20the%20case%20against%20thomas%20lubanga%20dyilo.aspx.
[15] Ibid.
[16] *Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(E) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008*, at 73.
[17] Alex Whiting, "Lead Evidence and Discovery before the International Criminal Court: The Lubanga Case," *UCLA Journal of International Foreign Affairs* 14, no. 1 (2009): 224.
[18]As Mills (2015) argues, those working in conflict zones to provide humanitarian assistance need to consider what possible effects providing information to the ICC might have on their efforts and their abilities to alleviate suffering. Sometimes it might necessary for humanitarian aid workers, for instance, to keep silent about certain criminals in order to continue to be able to provide assistance to those caught up in the conflict. (See Kurt Mills *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute, and Palliate*. (Philadelphia : University of Pennsylvania Press, 2015, pp. 49-50))
[19] Christodoulos Kaoutzanis, "A Turbulent Adolesence Ahead: The Icc's Insistence on Disclosure in the *Lubanga* Trial," *Washington University Global Studies Law Review* 12, no. 2 (2013): 277.
[20] *Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(E) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008*, at 77.
[21] ICC Office of the Prosecutor, *Prosecution's Application for Leave to Appeal "Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(E) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008"*, 23 June 2008.
[22] ICC, "Stay of Proceedings in the Lubanga Case Is Lifted - Trial Provisionally Scheduled for 26 January 2009," news release, 18 November, 2008, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20%282008%29/Pages/stay%20of%20proceedings%20in%20the%20lubanga%20case%20is%20lifted%20_%20trial%20provisionally%20schedule.aspx.
[23]This ruling is also in line with an earlier argument of the Appeals Chamber when it had decided that "a fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped." (Appeals Chamber 2006, at 37)
[24] ICC Trial Chamber I, *Redacted Decision on the Prosecutor's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the Vwu* 8 July 2010, at 28.
[25] Ibid., at 27.
[26] Ibid.
[27] "The Appeals Chamber Reversed the Decisions to Stay Proceedings and to Release Thomas Lubanga Dyilo," news release, 8 October, 2010, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/press%20releases/Pages/pr579.aspx.

[28] ICC Appeals Chamber, *Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 8 July 2010 Entitled "Redacted Decision on the Prosecutor's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the Vwu"*, 8 October 2010, at 48.
[29]Examining the motivations of US actions in these instances is beyond the scope of this chapter. It should be noted that even though national interests played a role in changing attitudes (the US realised that its strategy of active hostility was harmful to its own interests), state leaders also realised was difficult to sustain opposition to a Court that was accepted by a large number of states. (For a more detailed analysis see, for instance, Andrea Birdsall, "The "Monster That We Need to Slay?" Global Governance, the United States, and the International Criminal Court," *Global Governance* 16, no. 4 (2010).)
[30]These double standards are also evident in the language of Security Council referrals that exempts non-states parties other than the state question (Darfur and Libya respectively) from the ICC's jurisdiction.
[31] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford New York: Oxford University Press, 2014), 189.
[32] Fatou Bensouda, "Closing Keynote Address," in *Atrocity Reporting and the Responsibility to Protect*, ed. Stanley Foundation and the Global Centre for the Responsibilty to Protect (New York2012).
[33] James Wilson, "On the Legislative Authority of the British Parliament," in *Collected Works of James Wilson*, ed. Kermit Hall (Indianapolis IN: Liberty Fund, 2007 [1768]).
[34] Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford: Oxford University Press, 2009).
[35] M.C.J. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967).
[36]See Mills (2015) *International Responses to Mass Atrocities in Africa*, especially pp. 30-31.
[37] William A. Schabas, "United States Hostility to the International Criminal Court: It's All About the Security Council," *European Journal of International Law* 15, no. 4 (2004).
[38] Admittedly, these concerns about compromising the US constitution draws more on the worry that the constituent power of the American people will be undermined by giving in to a powerful court. Christopher Mollers has recently argued that the separation of powers doctrine derives its legitimacy from its representative nature. Christopher Mollers, *The Three Branches: A Comparative Model of the Separation of Powers* (Oxford: Oxford University Press, 2013). Nevertheless, the irony of refusing a separation of powers at the global level still stands.
[39] Andrea Birdsall, "The "Monster That We Need to Slay?" Global Governance, the United States, and the International Criminal Court," *Global Governance* 16, no. 4 (2010).
[40] See for instance Milan Markovic, "The ICC Prosecutor's Missing Code of Conduct," *Texas International Law Journal* 47, no. 1 (2011). Heikelina Verrijn Stuart, "The ICC in Trouble," *Journal of International Criminal Justice* 6, no. 3 (2008).
[41] 413.